N THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

PAMELA G. CAPPETTA,

Plaintiff;

v. Civil Action

3:08CV288

GC SERVICES LIMITED PARTNERSHIP,

Defendant.

September 1, 2009
Richmond, Virginia
9:00 a.m.

BEFORE: HONORABLE JAMES R. SPENCER
Chief United States District Judge

APPEARANCES: LEONARD A. BENNETT, ESQ.
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JEFFREY B. KULL
OFFICIAL COURT REPORTER

P-R-O-C-E-E-D-I-N-G-S

THE CLERK: Case Number 3:08CV288: Pamela G. Cappetta versus GC Services Limited Partnership. The plaintiff is represented by Leonard Bennett and Matthew Erausquin. The defendant is represented by Charles Sims and Brian Brooks. Are counsel ready to proceed?

MR. BENNETT: Plaintiff is.

MR. BROOKS: Defense is.

THE COURT: We are here on defendant's motions. I'll hear from you.

MR. BROOKS: Good morning. Brian Brooks for defendant GC Services. Your Honor, when this case was filed in mid-2008 it was a straightforward single plaintiff case alleging debt collection violations. So far so good. But with the filing of the second amended complaint new claims are added which raise unique merits issues. That's why we have responded with Rule 12. These issues have never been addressed by this Court before and we think an examination of these claims demonstrate that the plaintiff's claims at this juncture have to be dismissed for failure to state a claim.

There are four counts, and I think our arguments are straightforward, but let me begin by talking about the most important claims, the claim asserted as a nationwide under the Credit Reporting Act. There are two cases in

the brief which essentially frame the standard of review here. One is cited by Mr. Bennett, one is a case cited by us. Mr. Bennett's case is STERGIOPOULOS @ IVELISSE v. FIRST MIDWEST BANCORP, Seventh Circuit, and it makes clear what the FCRA prohibits. The quote from the case is that "A user of a credit report cannot troll for reports nor can it request reports on a whim." That's the prohibition in the case that Mr. Bennett cites.

Now, our case from the Fourth Circuit called KOROTKI frames the other side of the issue. That is that a defendant, a user of consumer reports, need not know that the person on whose part a report is pulled is in fact an obligor on a debt. It instead needs only have a reasonable basis for thinking that is so. So what you will hear me say this morning like a mantra is that there are three allegations in the complaint that make clear this plaintiff can't satisfy that standard.

Here is what the three allegations are, Your Honor. First, the plaintiff alleges that there was in fact a delinquent American Express account. That's in Paragraph 5 of the second amended complaint. Second, the plaintiff affirmatively alleges that she was listed as a supplemental cardholder on that account. And third, plaintiff alleges in Paragraph 31 of the amended complaint that American Express reported that account to the credit

bureaus under her name. All of those facts are affirmatively alleged in the complaint.

Now, what the case is really about is the allegation that notwithstanding all of those facts, this plaintiff never actually had the account. She was abused by her estranged husband, who duped her, who opened an account in her name without telling her. That all may be true, and for purposes of today's Rule 12 motion we will assume that's true. But as long as those other three facts are correct, under governing law GC Services can't be held liable for a violation of the Fair Credit Reporting Act. That is because, Your Honor, the FCRA is an intent-focused statute focusing not on an ex post analysis of what the plaintiff actually owed, but on an ex ante analysis of what a reasonable person could have known about the debt based on publicly available information at the time.

And as I say, what those three points are is that there was a delinquent account, this plaintiff was listed as a supplemental cardholder on that account, and it was reported to the bureaus by the credit card company in her name. As long as those three facts are alleged and assumed true for these purposes, we satisfy the standard.

Now, essentially what the plaintiff says in this case is that because GC Services made a mistake, because

it later turned out that this $10,000 debt reported in her name wasn't actually owed by her, that GC Services must have violated the FCRA and must have lacked a permissible purpose because this plaintiff didn't actually initiate the credit transaction at issue. But respectfully, Your Honor, that's not the law, as the cases we cite demonstrate. Two very good examples are the TRIKAS case out of the Eastern District of New York and the KENNEDY case from the federal court in New Orleans.

TRIKAS is very, very close on the facts, a federal district court case from just a couple years ago. What happened in that case was you had a bank that had no consumer relationship with the plaintiff. The bank thought it did because in the past the plaintiff had been an account holder at the bank but that account had been closed months ago. The bank just made a mistake by forgetting to code the account as closed. So for more than a year after the account was closed the bank continued to pull credit reports on that putative account holder. Later, when the account holder came forward and made clear that he in fact had no account and in fact had no customer relationship that would support the requesting of a consumer report, he filed a claim nearly identical to the case at issue here.

What the bank said is, "Listen, we don't dispute

for purposes of these claims that this individual no longer is a customer. But our case is that we had every reason for thinking he was because he once was and our computer systems continued to tell us that he was." And on that basis judgment was entered in favor of the bank and against these claims on the basis that even if wrong, the bank had a reasonable basis for thinking that this person was in fact a customer.

An even better example is the KENNEDY case, KENNEDY v. VICTORIA'S SECRET. What happened in this case was that an identity thief stole the plaintiff's credit card information and used that information to apply for a store credit account at Victoria's Secret. Victoria's Secret didn't do a special investigation to see whether the account applicant really was the person he purported to be. Instead, they took the application at face value, ran the application through the credit bureaus, and pulled a consumer report and issued the credit card. The victim of the identity theft then sued Victoria's Secret for its trouble saying, "Listen, I didn't apply for the account." Rule 12 dismissal was entered in that case in favor of Victoria's Secret on the ground that even though it was wrong in its belief that the identity theft victim was actually the account applicant, it had a reasonable basis for thinking that the person was, and that is sufficient

in that case to absolve the defendant of an FCRA claim.

Under those standards, we think it is clear that GC Services satisfies the permissible purpose requirement in this case. What we know from the Fourth Circuit's KOROTKI case is that a reasonable basis is what is required, not correctness, not accuracy in fact, but an ex ante reasonable basis. As I said, those three allegations in the complaint, the existence of the account, the account in her name, the reporting of the account to the bureaus in her name, shows that there was an objective reasonable basis on the face of this pleading sufficient to permit dismissal under Rule 12.

Now there is a separate point we make in the briefing, and I won't trouble the Court long on this, but I will point it out, which is in addition to those three affirmative allegations that by themselves bring us within TRIKAS and KENNEDY and cases of that ilk, in addition to that fact, it is relevant for purposes of this motion that the plaintiff here is the spouse of the actual obligor and she affirmatively so alleges in her complaint. We cite to Your Honor a number of cases, including the Fourth Circuit's decision in SMITH v. GSH RESIDENTIAL REAL ESTATE, which hold that there are a wide variety of circumstances in which even a spouse who isn't even a putative obligor can be the subject of a consumer report

pull. None of those circumstances is exactly on all fours in this case, but I think it is relevant, as the SHORT v. ALLSTATE CREDIT BUREAU court said a couple years ago. Under Section 1681b(a)(3)(A), I'm quoting here, "A creditor may request information on an applicant's spouse in a number of circumstances." We have cited cases that show the general framework within which that is the case. Some of those circumstances are, as the Fourth Circuit said, where the spouse may use the account. Well, from the perspective of an ex ante user of the consumer report here, Ms. Cappetta was certainly such a person. But for the fact of her husband's apparent fraud, she was a supplemental cardholder on the account; she was entitled to use the account had she known about it; and so far as GC Services could have been aware based on the complaint allegations, she would fit within that framework.

Of course, there are other circumstances as well, such as when the spouse is a guarantor, when the spouse shares other common accounts, when the spouse lives in a community property state, et cetera. As I say, none of those facts are quite exactly right here, but because the KOROTKI standard is reasonable basis, the fact that Ms. Cappetta is the spouse of the actual account holder is yet another reason why there was a reasonable basis for GC Services to think ex ante that it was proper to pull the

credit report here.

Your Honor, under these cases, we think it is clear that Rule 12 dismissal is appropriate. Frankly, the plaintiff doesn't cite a case in circumstances anywhere like this that would deny dismissal here. The truth of the matter is, the real facts might have supported the debt collection claim, they might have supported the claim as originally pled in the first complaint. But when the plaintiff reaches out to hold my client liable for pulling a report where she was the reported debtor and her name was all over the account, that's enough to dismiss that claim today.

Your Honor, let me turn now to the three other claims in the case which I think we can dispense with relatively quickly.

As you know, we argue in our briefing that the voluntary payment doctrine precludes all three of the remaining claims. Those are claims under the federal Fair Debt Collection Practices Act, under the Texas state Debt Collection Practices Act, and under the federal Credit Repair Organizations Act. All you need to know about the voluntary payment doctrine is it is essentially a waiver principle. What it says is you can't clog up the courts by paying a debt that you dispute at the time only to buy yourself a lawsuit and a ticket into the courthouse.

That's essentially what the principle is. That doctrine has been applied in Virginia to bar all manner of claims. It has been used to bar negligence claims. It has been used to bar statutory claims. It has been used to bar breach of contract claims and others.

THE COURT: It hasn't been used to bar federal statutory claims.

MR. BROOKS: We cite a number of cases, and the most recent and best example is a case called --

THE COURT: Answer my question first.

MR. BROOKS: The answer is in the class action context, yes. The way the issues mostly come up is that class certification defendants argue that state voluntary payment doctrine defenses will bar some of the plaintiff's claims. Typically what happens is that the courts acknowledge that the voluntary payment doctrine will apply, and either conclude it is sufficiently individualized to preclude class treatment, which is what the case we cite says, a 2009 New Jersey federal case -- I apologize, I don't have the name in front of me -- or sometimes they argue that the voluntary payment doctrine defense will be common as to all of the class members so the case can go forward.

But the most recent case we could find from February of just this year was a federal FDCPA case which

ruled that voluntary payment doctrine defenses would apply and the Court denied class certification. So yes, we think it applies.

The plaintiff admittedly cites two cases from at least five years ago from district courts outside this Circuit that have held that the FDCPA preempts the state voluntary payment doctrine. Here is what's wrong with that argument, apart from the fact that the cases are old and outside this district. The problem is this: The federal FDCPA has about as close to an anti-preemption principle as you can imagine in federal law. Typically, where Congress wants to preempt state law, it does so expressly. It says, "Notwithstanding any provision of state law to the contrary," or vests an agency with the power to promulgate regulations that will be preempted. Lots of federal statutes have similar provisions. The Fair Credit Reporting Act would be a good example of a statute with such a provision. But here, what the FDCPA says, and CROA, the other federal claim has a very similar provision, it says those statutes, quoting, "do not annul, alter, or affect, or exempt any persons subject to the provisions of this subchapter from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the

extent of the inconsistency." That is about as broad a savings clause as one can imagine in a statute that might have a very narrow preemption provision.

What we know from WYETH v. LEVINE, which is a 2009 Supreme Court decision all about conflict preemption, is that conflict preemption is to be interpreted very narrowly. States, when exercising their police powers in areas like debt collection, are entitled to regulate except insofar as Congress expressly says to the contrary. That's the command of WYETH which rejected a preemption defense and very narrowly construed conflict preemption.

The question here for purposes of the plaintiff's argument is, is there something about the Virginia voluntary payment doctrine that would in some way nullify the FDCPA, something that would be inconsistent with one of the substantive commands of the FDCPA. I think the answer on analysis is no. Here is why. What the FDCPA does, Your Honor, is it prohibits harassment and it prohibits false statements with respect to the nature or amount or status of a debt. There is nothing about the voluntary payment doctrine that says otherwise. All of those things are plainly and clearly impermissible both under Virginia state law as they would be under federal law. All the voluntary payment doctrine says is, as a procedural matter of waiver and just for that purpose, you

can't pay a debt knowing the basis for a dispute and then later file a lawsuit on it. And nothing about that is inconsistent with any of the substantive commands of the FDCPA.

One of plaintiff's arguments here is to cite somewhat mysteriously a Texas case for the proposition that in Texas the voluntary payment doctrine doesn't apply to statutory claims. The case they cite is not even actually an FDCPA claim. But that's cold comfort in a state where we are bound to apply Virginia choice of law rules. Under KLAXON, this Court sits in diversity with respect to the state law claims, and what we know is that the Virginia voluntary payment doctrine applies generally to statutory claims. That's COMMONWEALTH v. CONNER, which we cite in our briefing. We think there is no basis for saying on the basis of two five-year-old unpublished District Court cases from other jurisdictions that the weight of authority holding that the FDCPA and CROA no less than state law claims are barred by the voluntary payment doctrine.

One thing that bears noting here is that preemption, which their principal argument, obviously doesn't apply to their Texas statutory claim. That's a state claim. So at a bare minimum, it becomes clear that there is this state law claim that would be governed by

voluntary payment principles. Their argument about that state law claim, since they have no preemption argument, is that well, Ms. Cappetta paid the money under duress and so it would be unfair to bar her based on the voluntary payment doctrine here. But on that point the Virginia Supreme Court has spoken explicitly and clearly and repeatedly, the most recent example being WILLIAMS v. CONSOLVO. But we cite four other earlier cases on which that case is based.

What Virginia says is it isn't duress for someone to threaten legal action to enforce a debt and it isn't duress for someone to tell you that they will report you negatively to the credit bureaus if you don't pay. Duress in Virginia under this doctrine is defined as the imminent loss of property. And nothing like that is here. All that is alleged in the complaint is that someone from GC Services told Ms. Cappetta on the phone that if she didn't pay they would report her to the bureaus and that would negatively affect her credit. Footnote: Her own complaint notes that American Express had already reported the account as delinquent on her credit report. The idea there would have been any unique threat posed by GC Services threatening to report this delinquent account as delinquent is probably belied by the complaint allegations.

Let me turn briefly and conclude, Your Honor, moving on from the voluntary payment doctrine, to talk about the other two claims. Specifically, one being the Texas statute, the other being the Credit Repair Organizations Act. We don't think plaintiff really even seriously tries to defend these claims here. I think what is almost common ground in this case is that those two claims will have to fall away.

On the Texas debt collection statute, our argument is choice of law. Plaintiff in an earlier version of her complaint had a Virginia statutory claim. She has abandoned that claim. Plaintiff, a Virginia resident who got a debt collection phone call in Virginia and allegedly suffered damages in Virginia, is trying to take advantage of a statute in Texas because that's where GC Services has one of its offices. That can't be done in Virginia, which applies lex loci delicti, the law of the place of the wrong. The Fourth Circuit in WITHERS looked at a very similar case, a debt collection claim involving a woman who lived in Maryland but received her debt collection call at her place of business in Washington, D.C. She brought a claim under Maryland law and the holding was no, because Maryland, like Virginia, is a lex loci state. The law where the phone call was received applied. That would be Washington D.C. The Maryland

claim must be dismissed.

So, too, this plaintiff has no connection with Texas. We are in Virginia. Everything relevant to the claim happened in Virginia. That claim plainly must be dismissed.

Finally, we have the Credit Repair Organizations Act, which again is really scarcely even defended, I think, in the plaintiff's briefing. There are two theories on CROA just to be clear. One of them, the original one outlined in the complaint, is that somehow GC Services is a credit repair organization. And the theory for that is when the GC Services telephone rep said to Ms. Cappetta on the phone that if she didn't pay it would negatively impact her credit, that was somehow advice for a fee designed to protect Ms. Cappetta's credit rating. We have explained in our brief why we think that's invalid, and the plaintiff essentially abandons that theory.

Plaintiff moves to a second theory different from that asserted in the complaint, and that is that CROA covers not only credit repair organizations but also persons. On that basis, they argue that GC Services is a person. The problem with that theory is, as the cases we cite make clear, CROA doesn't apply to persons; it applies to persons associated with credit repair organizations.

We cite a number of cases in identical circumstances where people have tried to invoke this theory against debt collectors. All of those have resulted in Rule 12 or summary judgment dismissal.

For those reasons, Your Honor, we ask that the complaint be dismissed in its entirety. And obviously, we will be happy to answer any questions you have.

THE COURT: Thank you very much.

MR. BENNETT: Please the Court, good morning, Judge.

THE COURT: Mr. Bennett, so we can save some time, let me give you some direction. I suggest you not waste any time on the Credit Repair Organization Act and the state law claim.

MR. BENNETT: Yes, Judge. I follow your advice.

THE COURT: Thank you.

MR. BENNETT: Judge, the Fair Credit Reporting Act claim is certainly the most contentious, the most, or at least the most significant by number of alleged plaintiffs at issue. Let me spend just a moment as an overview here. As you step back, it is difficult when you litigate, at point/counterpoint, not to get drawn into a false debate or false argument. And I want to make sure that we, the plaintiffs, don't do that and that we ask Your Honor to not walk down that same path.

There are two false premises or castings of this argument that Your Honor doesn't need to go to. I think we win even if you do, and I can debate the minutiae within those. But the two big points that Your Honor should not be tempted to go down because they don't matter here are as follows: First, this defendant, GC Services, is not American Express. That is, this is a debt collector that is following the instructions of its principal, American Express. The question of whether or not an authorized user who never used an account, or who used an account, or any other person that American Express may think owes it money, whether American Express can use a consumer's report is a debate that you don't need to referee. Because in this case, I'm getting beyond the pleadings, the simplest answer is that the complaint alleges plausibly that this defendant with respect to Pamela Cappetta did not have a permissible purpose. The allegations in the complaint allege a plausible cause of action and this is a Rule 12(c)(1) posture. But the defense's attempts to explain, well, they could have owed American Express money because that is what was really going on, is a moot point if this defendant is not American Express, if there is not factual evidence that this defendant was ordered or instructed or requested by its principal to attempt to collect from supplementals.

And so whether or not GC Services accessed a report is not -- lawfully accessed a report is not a question Your Honor can answer by looking at the separate factual question of whether a supplemental could owe American Express money.

This is a Rule 12 posture, but in the class certification briefing we actually have evidence that's offered, and there won't be a response to it, the defendant has testified, American Express has testified, that it was never -- American Express never asked GC Services to collect from supplementals by pulling consumer reports or otherwise. And so the first red herring or false path to avoid is combining GC Services and American Express in terms of whether or not a creditor has a permissible purpose to access the consumer reports. Because even if Your Honor ruled contrary to what we think the law of the case is or the law is as we have argued it is or the facts we allege with respect to whether American Express could pull a consumer report about non-account-holder obligors, that is, the claim that some people owe it money even if not on an account, is irrelevant to the question of whether GC Services could do so.

Now, the second false path to avoid is this: And Your Honor doesn't know Mr. Brooks, but he and I have

been responsible for most of the large FCRA class actions in the country on the other side. He is a fantastic attorney by reputation outside of this Court. But he is incorrect, and I'm sure misspoken, when he casts to Your Honor this case as confusion about fraud by a husband or identity theft. That's not what this case is about. And there isn't an allegation of identity theft.

Mr. Cappetta, the philandering Mr. Cappetta, the facts that are simply alleged, he actually used this American Express Card for that purpose, but he had an American Express account. He applied for it, got it. It was in his name. American Express doesn't have co-obligors. He didn't lie to anybody. He didn't forge Ms. Cappetta's name. He didn't use her identity. I don't know where this comes from. But this is not a case in which a defendant tried to go after the identity theft victim mistakenly. That's not this case at all, not in any regard.

This is a case in which American Express has only one obligor on its accounts. It is different than most every other credit card company. It never has co-obligors. And it calls it authorized users, in which the husband would have said, "Here is a credit card that I am responsible for. If you want to charge on it, you can. But it is my account."

We cite in the certification reply the actual language from American Express. And again, our allegations are plausible in a Rule 12 motion, but the American Express says, "Additional card members do not have accounts with us." American Express instructs GC Services, in fact, that additional card members are authorized users on the basic cardmembers' agreements and do not have independent accounts or written contracts with American Express.

So the second false path would be one in which Your Honor could be tempted to believe this scenario, would be that isn't present in any evidence in this case at all, that our client was an identity theft victim or otherwise. I don't know where that comes from. But that's not the case.

With respect to the allegations that are actually pertinent: The second amended complaint alleges a plausible cause of action, which is where we are right now. We recognize the need, both sides, to flesh this out because, of course, Your Honor could decide at some later point as well, and frankly, with the mediation set now on September 11th, Your Honor's feedback, both sides are seeking it. But the second amended complaint, amongst other allegations, at a minimum in Paragraphs 18 through 22, say the plaintiff was never an obligor, never applied

for the account, never had the plastic. American Express never represented to the defendant that the plaintiff was obligated. American Express never provided the Social Security Number, any information to the defendant.

So at a minimum, just a glance, and there are additional allegations, in Paragraphs 18 through 22 it is alleged in the second amended complaint a cause of action; this defendant accessed the consumer's report knowing she had no obligation whatsoever. So this theory about the confusion of GC Services is only that.

Now, to give away the end of the story, to be the spoiler here, the end of this, if we don't settle it in the two mediations this month, and Your Honor ultimately has to resolve a fact question, you will learn that the defense in the case, unquestionably, the defense, the general counsel 30(b)(6) testimony, will be "We did not know it was a consumer report." That's the defense. All the other testimony that you ultimately will hear from all the deposition testimony, everything, Your Honor, if you get deep into the law believing the parties have framed the actual factual issues here and legal issues that resolve those facts for you, you will be, I think, disappointed in the parties because this is not the case as the defendant has cast it that you ultimately will see.

There is no evidence that this defendant was

trying to collect. And that, I think, is the first argument in this transition beyond the false paths. That is, GC Services says, "Judge, you do not look to whether or not we were correct in believing we had a permissible purpose. You just look to whether or not we had a reasonable belief that we had a permissible purpose. The second amended complaint says they didn't have that belief. For this posture that would end. The big picture is, and again we actually cite the deposition testimony in the cert briefing, but the big picture is that this defendant will testify that it was never accessing these reports for the purpose of collecting from Pamela Cappetta. So this idea that it was mistaken in believing Cappetta may have owed the money and that's why it is pulling, there will not be one shred of evidence. I am not exaggerating. There is not a shred of evidence that it ever thought, believed in any regard that Pamela Cappetta owed or that the supplementals owed. The testimony will be that it accessed the information of Pamela Cappetta, of supplemental cardholders, of neighbors, of co-workers, family members, of children, of people that had no connection at all, for the single purpose of collecting from the single cardholder. And so accessing these Experian reports was never, as defendant suggests, because of a mistaken belief of a supplemental

owing the money.

The facts that defendant says make out its defense, the first is that there was a delinquent account. But we have cited the statute, the actual, the collection is -- I mean the statute, 1681b(a)(3)(A) allows the access of a consumer's report for, quote, collection of an account of the consumer. And the PINTOS case, a Ninth Circuit decision -- I cite the Ninth Circuit because it is a recent case, it is analytically strong and it is also the only circuit decision amongst our eleven on this issue -- the PINTOS case addressed the circumstance in which the consumer could be alleged to owe a debt, but not on a credit account. In this circumstance, theoretically, a spouse could owe, I guess, American Express. Again, that's not GC Services. It was never trying to collect from spouses by its testimony, but the spouse would not have had an account. The American Express documents we cite verbatim, we quote verbatim, and the briefings show this, there was never an account for supplementals, the neighbors, family members, others.

And so the purpose, the question of whether there was a delinquent account, is an incomplete fact. The question would have had to be there is a delinquent account of the consumer.

The second fact asserted is that the consumer

was a supplemental, which is an authorized user. We cite the law that authorized users are not responsible, contractually, under the contracts. The American Express contract says they are not responsible contractually under the contracts. And I don't know where that fact or how that fact makes the next connection. And the last is that American Express had reported this on our client's credit report. And this is another false fact. And again, I'm sure it is a mistaken representation. Because American Express never reported our client as obligated, ever, on her credit report. In fact, to the contrary, American Express only reported her, and this is in the second amended complaint, as an authorized user, somebody not responsible. It wouldn't have hit her credit score. The delinquency doesn't affect her. She was reported simply as an authorized user.

And so if the defendant believes that it would have to show in these three facts that would help its defense help prove our complaint as plausible, that a fact, I don't know how it would be relevant, but that if a fact was necessary, that the American Express had told the defendant through the reporting in my client's credit report that she was obligated, that's not pled and it is not true.

On top of that, Judge, there isn't an

allegation, and there isn't an allegation because it doesn't exist, from the defendant that it ever would have seen our client's credit report prior to accessing her report. That is, the irony of this is defendant would be saying, "We had a reason to believe that this consumer was obligated, and thus go out and access her consumer report, and we had that reason to believe because we went out and accessed her consumer report and we would have seen something in it." The violation would be -- the defendant's representation to Your Honor here is that it believed our client was obligated before it accessed her report. And to argue that, it is saying to Your Honor, "We learned the basis for the belief to start the process of accessing the report at the end of this after we saw that report." Not only illogical, but factually incorrect, and legally irrelevant.

It is not the account of the consumer. The purpose for which the defendant theorizes it could have used the report was not the purpose it used the report. The complaint allegations are clean. And the KOROTKI case, I'm surprised the defendant cites it, because that case was a case in which the account holder, the obligor, I mean, that is the identity theft fact pattern that's described. The creditor believed that there was an obligation. And the question then was whether that belief

was incorrect. That's not what we deal with here. There was no allegation the defendant believed supplemental was obligated. There is no obligation the defendant had, and there won't be any evidence, that that's the reason that it pulled, that it was mistaken. That's not the case before you.

I think, Judge, we have significant briefing and I would be happy to answer any other questions with respect to the Fair Credit Reporting Act claim.

THE COURT: I don't have any further questions related to that claim. I would like you to speak to the voluntary payment doctrine and its application to the FDCPA claim.

MR. BENNETT: Yes, Judge. The defendant is mixing apples and oranges here. The Fair Debt Collection Practices Act claim says if you take certain types of action, then those actions which Congress has declared unlawful can be remunerated. You can be sued and recovery is available under the Fair Debt Collection Practices Act. So the defendants' assumption is that a necessary element of that would have been proving whether or not the debt was owed or not. The defendant also implicitly is arguing the voluntary payment doctrine applies to a circumstance in which if someone pays a debt and sues after the fact to recover that debt. The Fair Debt Collection Practices Act

claim, and certainly the SCOTT v. FAIRBANKS case addresses this as well, in fact every FDCPA has found in our favor. Your answer to Your Honor's question, I think, whether your question was rhetorical or inquisitive, there isn't a federal statutory claim like the FDCPA in which the voluntary payment doctrine has ever prevailed. But the FDCPA has other measures of damages. So that in the FDCPA a consumer can actually owe the debt. Those circumstances, somebody can owe the debt and certain types of conduct is still unlawful and there are other measures of damages under the FDCPA. And this is addressed in one of the footnotes in the briefing, but it is hard to answer because it is trying to fit a square peg in not a round hole, but a no hole at all. But Your Honor, the case law is clean on this.

In addition to the out of Virginia cases, the FDCPA cases, Judge Wilson, who Your Honor I'm sure is acquainted with in the Western District, considered the BOVA decision, and as with all the questions really here before you, said these are all factual inquiries. The application of the voluntary payment doctrine, if it somehow even did apply, and I don't think it did, it would be a question for the jury to determine whether the NEWTON, the Virginia Supreme Court's theory of whether it was voluntary is present in order for this affirmative

defense to apply. And there is no way on a Rule 12 posture that Your Honor could so rule.

Your Honor is our Chief Judge. This case had been set before a Magistrate Judge by this Court's consent order. But these issues had been addressed. Pretty much all of the claims that are present here have been addressed through briefing, have been ruled on, at least on one occasion. And the law of the case, I think, should bar the continuing rearguing or multiple attempts to make the same argument. But the voluntary payment doctrine is an affirmative defense, requires proof of facts. There is not a sufficient basis in the second amended complaint for Your Honor to determine that there is not a plausible claim under the Fair Debt Collection Practices Act because of this, and every Court to consider its application to Fair Debt Collection Practices Act claims has ruled as the plaintiff asks and contrary to as the defendant prays.

So Judge, Your Honor has endured significant briefing in the case, and I would be happy to answer any other questions.

THE COURT: I don't have any questions. Thank you very much. Brief rebuttal.

MR. BROOKS: Your Honor, thank you. Just two or three points by way of rebuttal.

Mr. Bennett begins by announcing what he

contends are some false arguments. And let me go through a couple of those just to explain the debate. His first point has to do with the idea that GC Services is not American Express. And to the extent I'm able to understand that argument, I think what counsel seems to be saying is that whatever GC Services could have known, American Express knew that this person was not in fact an obligor and did not in fact use the account and somehow American Express, the principal, has its knowledge imputed to GC Services, the agent. That seems to be the context.

This is not an argument ever raised in the briefing, but I will just say there is a Fourth Circuit case on this point, again not discussed in the briefing, but it responds to counsel's argument, called YOHAY v. CITY OF ALEXANDRIA CREDIT UNION, a 1987 Fourth Circuit case. What that case talks about is the agency analysis under the FCRA. What it says is that counsel's recitation of the law is exactly backwards. What it says is under the FCRA, a principal is liable for the FCRA violations of its agent, not the other way around. What seems to be the suggestion here is that because American Express had the ability to know other facts about card usage beyond what GC Services is alleged to have known, therefore, GC Services can be held to account for millions of dollars of FCRA damage. That under YOHAY isn't the way the statute

works.

Counsel gives a characterization of the facts based on what he contends are the deposition transcripts and other facts that have nothing to do with the pleadings. If you read the second amended complaint and the particular three paragraphs I'll point Your Honor to, I think they give the lie to what has been argued. First of all, counsel says that the case is not about fraud by the plaintiff's husband. The husband didn't forge his name, didn't steal anybody's identity, didn't do anything wrong here that would be the basis for the argument. Paragraph 23 of the second amended complaint says, it says and I quote: "Plaintiff's ex-husband, Robert Cappetta, had opened the American Express account using a Post Office Box the plaintiff had no knowledge of and that her husband had previously told her that he had closed." That's what that paragraph said. Then counsel says that American Express has only one obligor and did not report Ms. Cappetta's name to the credit bureaus. But of course what Paragraph 31 of the second amended complaint says, and I quote, "Plaintiff has learned a few days earlier in conjunction with a mortgage application that American Express was reporting that she was an authorized user on an unknown account within her credit file.

Then he says that GC Services did not have a

reasonable belief, as we have argued in our motion, because GC Services had no intention to collect from Ms. Cappetta; it knew it was only collecting from Mr. Cappetta. Yet Paragraph 38 of the second amended complaint purports to recite an alleged conversation between GC Services and Ms. Cappetta in which, if the allegation is to be believed, GC Services tried to harangue Ms. Cappetta into paying a debt it said she owed. I believe the quote from the complaint is GC Services said, quote, "Paying the amount demanded immediately would allow plaintiff to retain her good credit standing." These are the allegations of the complaint. It may be that counsel believes the facts to be otherwise, but that's not the issue on this motion.

At the end of the day, what we think the law is is fairly straightforward under Fourth Circuit law. KOROTKI says we could well be wrong about the fact she owed the amount. What we needed was a reasonable basis, and that is established by the existence of the account and the reporting of the account in her name. The Fourth Circuit also says that spouses, even if they are only authorized users, may well be proper participants in a credit report pull. That is the SMITH v. GSH case. Finally, counsel says that every FDCPA case has come out in his favor, although he has cited only two cases that he

mentioned. The cases, the 2009 New Jersey case denying class cert. because of the need to evaluate state voluntary payment defenses in an FDCPA case is called AGOSTINO v. QUEST DIAGNOSTICS INC, a 2009 U.S. District Court from New Jersey, Lexis 10451, from February of 2009. Thank you, Judge.

THE COURT: All right. Let me give you a bottom line so that you all know where you stand going forward. It seems relatively clear, and frankly, simple that the Credit Repair Organization Act as well as the state law claim will be dismissed. We will write a little bit about this to explain, but I don't think there is very much explanation required, it is so clear.

The Federal Credit Reporting Act, the motion for judgment on the pleadings will be denied. I think the Fair Debt Collection Procedures Act is a little closer, but I'm also going to deny that motion.

Now, there were a number of motions outstanding. And we don't have any dates for hearings. And we are a little bit off track on these things, and I want to get back on track. There's a motion for sanctions, motion for reconsideration. I probably can deal with those things. If you all haven't worked it out, I can deal with that on the pleadings. Essentially what we have here, one side says what I asked them to do, or what you requested them

to do which I ordered them to do, is basically impossible, or as close to impossible as it can get. And I don't see really any great need for additional argument on those motions. I will hear from both sides if you have another view. If you don't, I'll resolve that on the papers.

MR. SIMS: If I may, Your Honor, I just briefly, to comment on that, what I do have is I do have a CD that has -- we have had six employees and through Friday we have been able to gather 2,000 of the accounts. So if we had 600 employees, we would still only be about halfway through the 500,000 accounts. So what I would at least ask, Your Honor, I agree with you, I think it has been well briefed. If we could at least have relief right now from continuing to go through this process, which is just not going to get anybody to where they need to get to, and then I'm happy to go ahead and wait on the Court's order. I do have Ms. Walberg here, Vice-president of IT, if you have any questions that remain outstanding about what we are doing.

THE COURT: I understand your position.

MR. SIMS: Okay.

THE COURT: Mr. Bennett?

MR. BENNETT: If the Court please, I would say that we would submit on the pleadings except if the Court would provide me the discretion to just answer that one

comment.

THE COURT: Go ahead.

THE ATTORNEY: Judge, Ms. Walberg originally testified that they could never access the 1221 screen at all. It was impossible. And similarly, they testified before the May order that Your Honor issued that they could not produce the account records. In fact, they made exactly the same argument, that they would have to sit down at a terminal. The briefing we have offered Your Honor, and continuing our obligations under Rule 37 to meet and confer, I probably have had more meet and confer attempts in this case than my entire docket for the last year. The attempt to meet and confer that was most recently offered is, "Listen, GC, you are contending the possibility that some supplementals could have owed the debt. Provide the 1221 screens only for that, that subset."

And number two, the defendant is producing, in order to build up its burden in this argument, a lot more than what Your Honor ordered or that we asked for. They are not simply producing the 1221 screen, which is one screen having the supplemental spend data, but every other contact. In fact, non-supplementals on the family members' friends and everybody else, not simply the 1221's and not simply 1221's or obligated or asserted obligated

supplementals. We have offered that. There is always an obligation, whether or not Your Honor orders it or otherwise, for us to try to reduce docket congestion. We briefed it and that's all else I can say.

I would also suggest, Judge, that Your Honor, we are going to lose the CROA and Texas claim. If Your Honor has written anything on it, that's fine. If Your Honor chooses to, of course you can. But we would, I would move here, and Your Honor doesn't have to accept the motion because Your Honor has telegraphed Your Honor's decision, but I would move to voluntarily dismiss with prejudice under Rule 41 those two claims to save Your Honor the need to write on it. We wouldn't appeal Your Honor. We would move for that basis. The Court can accept our motion or not accept our motion. But there's a lot of work in the case, Your Honor.

A further status update, the parties have scheduled with the jams mediator, retired D.C. Superior Court Judge that does professional mediation in Washington, two mediation sessions, one on September 11th and one September 22nd, to the extent that Your Honor is attempting to come up with dates surrounding that. I think since Mr. Brooks, and since LeClair Ryan has gotten in, there has been a different tone in their dealings with us and the possibility that the carrier could participate.

THE COURT: All right. If you want to have a response to that, I'll give you the last word.

MR. SIMS: I would, Your Honor.

THE COURT: The ongoing technology fight about production.

MR. SIMS: We have been trying to do what the Court asked. We are not trying to create a burden. But I will say if you look at the Cappetta account, she is not even identified and there is a sub spend. So in order to get -- I would ask the Court, if he could just identify 100, 300 accounts, he has the data, we've got it on the screen. We can print those screens down and give it to him and he can just use that with the jury.

THE COURT: All right. And Mr. Bennett, that's probably -- we are going to have to do a sampling here. You can't get everything. I just don't --

MR. BENNETT: Last time we sent our expert down. We can do that again. They made exactly the same argument. We spent 16 grand to prove it was false. But we will do whatever Your Honor wants. We don't need this evidence, Judge. We are simply saying if they want to use the evidence they have got to produce it. We would be willing to accept a Rule 37(c)(1) exclusion. To the extent this defendant is claiming the supplementals --

THE COURT: All right, I understand. Okay.

What about a date for the class certification, a hearing on that issue? It would be after you all's mediation attempts, I guess. But let's try to get something firm here now if we can.

MR. BROOKS: We had understood from Your Honor's Clerk that September 28th or 29th might be available on your calendar. And our thinking was that would give us plenty of time to make progress if we are going to make progress on the mediation.

THE COURT: Are you available, Mr. Bennett?

MR. BENNETT: Both those days. Our concern is the defendant had asked us to put off that time. We agreed with their intent of mediation. Our concern is if we prevail on that motion, it will be, by the time the defendant gives us the completed class lists we will be bumping up against our fixed date for trial for class notice. It is possible we could do it, but tight.

THE COURT: What about 9:30 on the 29th of September?

MR. BROOKS: That works for us, Your Honor.

MR. BENNETT: It does for the plaintiff, Judge.

THE COURT: All right, we will put it down.

MR. BENNETT: Do you have a sense of how long you will set aside for that hearing?

THE COURT: I would say an hour. One hour for

all concerned.

MR. BROOKS: We will talk quickly.

THE COURT: All right. Thank you all very much.

MR. BENNETT: There is a briefing response would be due, but our motion to enlarge page limits for our reply brief. We had three people. I'm not -- I'm long on talking but not on paper. We did what we could to cut it out. We stayed within the Local Rules for font and margins and so forth. But there are significant arguments in the cert. motion that -- a lot of significant arguments that the defendant raised that we addressed, and officially our reply isn't filed until Your Honor accepts it. We filed the motion for enlargement of page limits at the same time. I don't usually do that, but it was necessary here.

THE COURT: Are you all objecting to his additional pages?

MR. BROOKS: We would just --

THE COURT: I'll rule on that today. We will decide it. Thank you very much.

(Proceedings adjourned at 10 o'clock a.m.)

CERTIFICATE OF REPORTER

I, Jeffrey B. Kull, Official Reporter, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____/s/_____

Jeffrey B. Kull,
Official Federal Reporter

_____/s/_____

Date